

ARMY

PROCUREMENT POLICY ALERT BULLETIN

NO. 97-007

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The enclosed document is forwarded for your information and any necessary implementation in advance of formal publication of a Federal Acquisition Circular (FAC), or Defense Acquisition Circular (DAC). There will be no Department of the Army-level supplementation or implementing instructions.

ENCLOSURE:

USD(A&T) Memorandum, Subject: Interim Draft Department of Defense Guidance Implementing 10 U.S.C. 2539b, "Authority to Sell", Apr 17, 1997

This bulletin is issued by the Office of the Deputy Assistant Secretary of the Army (Procurement). Comments or questions should be referred to the Procurement and Industrial Base Policy Team, SARD-PP, Room 2E661, 103 Army Pentagon, Washington, DC 20310-0103.

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ACQUISITION AND
TECHNOLOGY

APR 17 1997

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
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SUBJECT: Interim Draft Department of Defense Guidance Implementing 10 U.S.C. 2539b.
"Authority to Sell"

Section 2539b of Title 10 of the United States Code provides the Department of Defense with authority to sell, lend, rent or give various items or services, to include the sale of test facility services at laboratories, or other facilities. An interservice, Office of the Secretary of Defense working group was established to draft an instruction to implement this statute. The interim guidance attached to this memorandum reflects the efforts of that group, and should be followed by all departments and components until a final instruction is prepared.

In following this interim instruction, it is imperative that those responsible for implementation be diligent in making a determination that providing the services of government laboratories or other facilities will not constitute undue competition with the private sector.

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Paul G. Kaminski

Attachment

A. POLICY

It is the policy of the Department of Defense to promote research and development within the commercial sector of the U.S. economy, and the transfer of technology from the military to the commercial sector. These policies further national security by promoting the development of a national industrial and technological base from which to sustain military technology superiority while enhancing productive capabilities for the nation overall.

This policy memorandum furthers these goals by implementing guidance for statutory authority, under 10 U.S.C. 2539b, to provide samples, drawings and other information, and to sell, rent, or lend government equipment or materials to various entities. In many cases, providing information or unique or scarce items to a private sector entity will significantly aid that entity's ability to engage in research critical to the development of a useful commercial technology.

This policy memorandum also furthers those policies by implementing guidance for the commercial use of defense test facilities. This memorandum is not intended, however, to supplant use of comparable authorities under the Stephenson-Wydler Act or 10 U.S.C. 2681. Finally, although the authority to sell, rent, or lend equipment to private entities for use in demonstrations to friendly foreign governments is covered in this statute, implementing guidance for this authority will be contained exclusively within DoD Directive 7230.8.

B. DEFINITIONS

"Drawing" means a diagram, plan, or list detailing the fabrication and assembly of structural elements, or the installation of materials and equipment. A drawing details the characteristics, or outlines the parts or operation of a product or item.

"Equipment or materials" means personal property, including machinery, devices and apparatus, and components of such items.

"Independent research and development ([R&D) programs" means a research and development effort that is not sponsored by, or required in performance of a government contract, or grant for: (1) basic research, (2) applied research, (3) development, or (4) systems and other concept formulation studies. IR&D programs also do not include technical efforts expended in developing and preparing technical data specifically to support submitting a bid or proposal.

"Laboratory" means a facility or group of facilities owned, leased or otherwise under the jurisdiction and control of the Department of Defense, a substantial purpose of which is the performance of research, development, engineering, test and evaluation, or otherwise developing or maintaining technology.

"Manufacturing or other information" means any blueprints, drawings, plans, instructions, documentation or other technical information that can be used or adopted for use to design, engineer, produce, manufacture, operate, repair, overhaul, or reproduce any equipment or material.

"Person or entity" means an individual, partnership, corporation, association, state, local, or tribunal government, or an agency or instrumentality of the United States.

"Sample" means a unit or units of a product drawn from a lot or batch that is representative of the product and is constructed in conformance with the requirements and complies with specifications of the product.

C. IMPLEMENTATION/GUIDANCE

1. General. When in the interest of national defense, the Secretary of Defense and secretaries of the military departments, or their designees, in accordance with 10 U.S.C. 2539b, are authorized to:

a. Sell, rent, lend, or give samples, drawings, and manufacturing or other information (subject to the rights of third parties and the restrictions in paragraph C.2) to any person or entity;

b. Sell, rent, or lend government equipment or materials to any person or entity for use in independent research and development programs, subject to the condition that the equipment or material be used exclusively for such research and development; and

c. Make available to any person or entity, at a prescribed fee, the services of any government laboratory, center, or other testing facility for the testing of materials, equipment, models, computer software, and other items.¹

2. Delegations.

a. The authority to implement the authority in C. 1. is hereby delegated to the Acquisition Executives of the Military Departments and the directors of the defense agencies.

b. The authority to implement the authority in C.I.c is hereby delegated to directors or commanders of government laboratories, centers, or other facilities for the testing of materials, equipment, models, computer software, and other items, subject to direction or control by a higher office.

3. Samples, Drawings, and Manufacturing or Other Information. Samples, drawings, and manufacturing or other information that is technical data (see DFARS 252.227-7013) shall not be disclosed to buyers, renters, lessees, or potential buyers, renters, or lessees, unless the

¹ The commercial use of Major Range Test Facility Bases is governed exclusively by DoD Directive 3200.11, "The Major Range and Test Facility Base," as amended to implement 10 U.S.C. 2681.

government is authorized by 10 U.S.C. 2320 to do so, the owner or licensor of such information has authorized the government to do so, or the government has obtained a license to the data that permits such disclosure. Classified information shall not be sold, rented, loaned, or given pursuant to this authority unless such a release of information is in accordance with DoD 5200.1-R. Unclassified, but sensitive material, shall be handled in accordance with DoD Directive 5230.25.

4. Government Equipment or Materials. In determining whether to sell, rent, or loan government equipment or materials, considerations shall include, but not be limited to:

- (1) the current or probable future need of the government for the item;
- (2) the residual value of the item;
- (3) expenses incident to handling and storage of the item;
- (4) the probable cost of reproduction of the item in the event of future procurement;
- (5) potential requests in the future and the ability of the laboratory/facility to handle the requests once a precedent has been established; and
- (6) whether the sale, rent, or loan furthers the transfer of technology to the commercial sector in accordance with the policy set forth at subsection A, above.

5. Services of Government Facility Resources.

a. The authority of C.I.C. may be exercised when (1) the person or entity requiring the services has established in writing, and to the satisfaction of the director or commander, that provisions of the services will not constitute undue competition with the private sector; and (2) that the service does not involve expansion of the capabilities and capacities of the laboratory/facility providing the service, even if the person or entity agrees to finance the expansion.

b. Except as provided in paragraph 5.c below, the testing of material and other items not owned by the government shall not cause government personnel or other government resources to be diverted from scheduled tests of government material or otherwise interfere with government mission requirements.

c. The laboratory director or activity commander with immediate authority over the government testing facility shall determine the priority of use of such facility for testing of material and other items not owned by the government. In making this determination, the director or commander shall consider the degree to which the proposed test furthers the policies set forth in subsection A above, and priorities of scheduled government tests and may revise established test schedules in order to accommodate tests of material and other items not owned by the government.

d. The government may not disclose the results of tests performed in government testing facilities under subsection C. 1. c without the consent of the persons for whom the tests are performed.

D. FEES AND PROCEEDS.

1. General:

a. Fees charged for sales, rentals, or loans authorized by subsections C.1.a and C.1.b shall include all direct and indirect costs to recover the total costs to the government. Fees for DoD Working Capital Fund activities shall be the standard (stabilized) price. Guidance for full cost recovery is prescribed in Chapter 1 of Volume 11A of the "DoD Financial Management Regulation" (DoD 7000.14-R).

b. Internal management controls (see DoD Directive 5010.38) must be established to ensure that fees (and proceeds) are developed and adjusted, using current, accurate, and complete data, to provide reimbursement conforming to these requirements. Such controls also must ensure compliance with cash management and debt collection policies (see DoD Directive 7045.13).

c. Unless otherwise permitted by law, payment for items and fees incident to a sale, rent, or loan under paragraphs C.1.a and C.1.b shall be made in advance and only be made by cashier's check, certified check, bank money order, or postal money order. Payments received for services provided under paragraph C.1.c may be retained by the activity providing the services.

2. Services of government Facilities

a. When government services are made available under paragraph C.1.c, a fee generally shall be imposed to recoup the total cost incurred by the government in providing the service. DoD Working Capital Fund laboratories/facilities shall always use the standard (stabilized) rate to establish fees. For all other laboratories/facilities, when approved by the director/ commander, prior to providing the service, all or a portion of the indirect costs may be eliminated from the fees. Direct costs must, at a minimum, be recouped. Sales of services at less than the total cost are only permitted when there is a compelling reason, in the interest of national defense and in accordance with the policy considerations in A., above, to provide the services at less than the total cost.

b. Special consideration as to recovery of less than full cost may be given when:

(1) the recipient of the benefit is engaged in a nonprofit activity designed for public safety, health or welfare,

(2) payments of the full fees by a state, local government or nonprofit activity would not be in the federal government's best interest; or

(3) laboratory/facility directors/commanders have determined that the administrative costs of determining the full fees would be an unduly large part of the receipts from the activity.

c. When less than full cost is charged, laboratory/facility directors/commanders shall maintain adequate documentation that justifies or supports each decision. Such documentation should address the above criteria and be available for review by higher authorities or any audits or inspections.

d. Under no circumstances may fees exceed the amount necessary to recoup the total costs incurred.

e. Specific guidance pertaining to the calculation of charges and fees is provided in Chapter 4 of Volume 11A of the "DoD Financial Management Regulation" [DoD 7000.14-R)].

3. Collection of fees or Proceeds.

a. All fees or proceeds from persons or entities outside the U.S. Government must be collected in advance or at the time the service is provided.

b. Specific guidance pertaining to the collection of fees is provided in Chapter 4 of Volume 11A of the "DoD Financial Management Regulation" (DoD 7000.14-R).

4. Disposition of Fees or Proceeds Received

a. Fees received from sales, rentals, or loans of DoD property under subsection C.1.a and C.1.b shall be deposited in the miscellaneous receipts account of the U.S. Treasury, unless the sales, rentals, or loans are made by DoD Working Capital Fund activities.

b. Fees received for services performed under subsection C.1.c shall be credited to the appropriation, fund or account that finances the activity making such service available.

5. Warranties and Liabilities.

All transfers of property or services of whatever nature made pursuant to this regulation shall be without any express or implied warranty. The recipient must agree in writing that the government shall not be liable for any damage whether direct or consequential. Furthermore, the recipient of the property or service shall agree to indemnify and hold harmless the U.S. Government for any loss, claim, damage, or liability of any kind arising out of or in connection with property or services so provided.

E. EXCLUSIONS AND EXCEPTIONS.

The provisions of this instruction do not apply when statutes or directives or agreements, such as the following, provide different practices or procedures.

(1) Sale or disposal of surplus property under approved programs (see DoD Instruction 73 10.1).

(2) Records made available to the public, under the Freedom on Information Act, pursuant to DoD Directive 5400.7. Charges for such record searches and copies of records are governed by Chapter VI of DoD Directive 5400.7.

(3) Government-developed computer programs released to non-Federal customers. Charges for software packages are governed by DoD Instruction 7930.2.

(4) Pricing of performance by DoD Working Capital Fund activities shall be in accordance with Volume 11B of the "DoD Financial Management Regulation" (DoD 7000.14-R).

(5) Leases entered into under 10 U.S.C. 2667.

(6) Articles or services sold by a DoD industrial facility under 10 U.S.C. 4543.

(7) Supplies or articles sold, or services or work performed under 10 U.S.C. 2208.

(8) Grants, Cooperative Agreements or Other transactions pursuant to the Grants and Cooperative Agreements Act or 10 U.S.C. 2371.

(9) Agreements entered into pursuant to 35 U.S.C. 200 et seq.

(10) Agreements entered into to support U.S. commercial space launch activities pursuant to 49 U.S.C. 7011, or 15 U.S.C. 5807.

(11) Loans, gifts or exchanges under 10 U.S.C. 2572.

(12) Sales or disposal of excess or surplus personal property under DoD 4160.21-M.

(13) Sale or exchange of non excess personal property under DoD 4140.1-R.

(14) Material requiring demilitarization under DoD 4060.21-M-1

(15) Sale of articles or services by DoD Working Capital Fund facilities to persons outside DoD under 10 U.S.C. 2553.